

Steve Krane, COSAC, and the Rules of Professional Conduct

BY ROY SIMON

The article is my small attempt to honor the life and work of my friend and colleague, Steven C. Krane. He was the moving force behind the New York Rules of Professional Conduct that took effect in 2009. He virtually willed the new Rules into being. Without his efforts, it would not have happened. How did he do it? This article focuses on Steve's approach to organizing and leading the New York State Bar Association's Committee on Standards of Attorney Conduct ("COSAC") in the enormous project of drafting the proposed rules.

Background: The Krane Committee and the old Code

In 1983, the ABA adopted the Model Rules of Professional Conduct. The Halpern Committee soon recommended that New York adopt a version of the ABA Model Rules, but in 1985 the State Bar House of Delegates rejected that recommendation by a wafer-thin margin. In 1990, the Appellate Divisions accepted the State Bar's recommendation to graft some important Model Rules provisions onto the New York Code, but the Code was still behind the times. In 1995, therefore, the State Bar appointed Steve Krane to Chair a Special Committee to Review the Code of Professional Responsibility. After two years of study, the Krane Committee recommended comprehensive amendments to the Code. Steve did most of the drafting personally, without the help of a Reporter. The House of Delegates approved the report and forwarded it to the Appellate Divisions on March 4, 1997. More than two years later, on June 30, 1999, the Courts approved most of the recommended changes.

Steve held strong opinions, but he was also open-minded. In November of 1999, we were on a program at the Nassau County Bar in honor of Neil Shane to discuss the recent amendments to the Code. In his keynote speech, Steve expressed contempt for the ABA Model Rules. He felt that they were a cold, business-oriented set of rules that lacked the professionalism and aspirational qualities of the New York Code of Professional Responsibility. Within a few years, though, Steve had changed his mind. By 2002, after the ABA Ethics 2000 Commission significantly improved the Model Rules, Steve came to respect the Model Rules. (Around that time, Steve had invited me to be a member of COSAC. I remember his ultra-succinct email invitation: "Wanna join?" That was the whole invitation to embark on one of the most interesting and important projects of my career.)

By 2002, only five jurisdictions in the United States still adhered to the old ABA Model Code of Professional Responsibility – New York, Iowa, Nebraska, Ohio, and Oregon. (By 2007, New York was the only state clinging to the Model Code.) Steve thought the time had come for New York to look again at the ABA Model Rules. In October of 2002, he convened a meeting of COSAC (his new name for the Krane Committee) to discuss the possibility of developing the New York Rules of Professional Conduct. Steve listened to everyone's opinions, developed a consensus, and went to work.

Steve organizes COSAC for the Rules project

Steve's first priority was to expand COSAC by inviting new members from all over New York State, and from all types of practice, all with substantial experience in professional responsibility matters. The old Krane Committee had only a dozen members. Five of them (plus Steve) stayed on for this new project, and Steve handpicked 18 new members, bringing COSAC's roster up to 24 members. The group was diverse in terms of geography, gender, age, experience, and practice area.

Next, Steve secured funding to do the project right. During the Krane Committee's review of the Code of Professional Responsibility, Steve did most of the drafting himself. He realized that to conduct a comprehensive review of the Code and simultaneously consider adopting the format and language of the ABA Model Rules, COSAC (like the ABA and the American Law Institute) would need a paid Reporter. Steve secured the necessary funds from the State Bar. I volunteered to serve as Chief Reporter without compensation, and we used the funding to hire three outstanding Associate Reporters – Roger Cramton of Cornell, Steve Wechsler of Syracuse, and Carol Ziegler of Brooklyn – all of whom had written and taught in the legal ethics area for many years.

Then Steve took a step to ensure that COSAC's ultimate work product, which would take a mighty effort by all of these talented and busy people, would not come to naught once it reached the ultimate authority, the Courts. Steve reached out to the Presiding Justices of the four Appellate Departments to see if they were receptive to adapting the ABA Model Rules of Professional Conduct to New York. The Presiding Justices told Steve that it would be a great project and that COSAC should go ahead. Steve spoke at length with Presiding Justice Cardona (P.J. of the Third Department) in February 2003, and he received correspondence from then-Presiding Justice Pigott (of the Fourth Department) to the same effect.

Steve also asked the Appellate Divisions to form a consultative group of disciplinary counsel so that COSAC could get the input from the people charged with enforcing the rules. Steve wanted to avoid proposing rules that disciplinary counsel would find unacceptable, and also thought that disciplinary counsel would have good ideas for changes to the Code. But the Courts refused to appoint a consultative group of disciplinary counsel and even instructed them not to discuss COSAC's work. Steve never understood why mere consultation would have been a problem, but it did not happen.

By March of 2003, Steve had developed a detailed work plan. He divided the ABA Model Rules into three groups of logically related rules. (*E.g.*, Group A contained all of the provisions on confidentiality; Group B included the provisions on conflicts of interest; and Group C included rules on advertising and other business issues.) Then Steve divided each group of rules into three "waves," putting the most controversial rules in the first wave and the least controversial rules in the last wave. Finally, he appointed subcommittees to handle each group of rules, and named an Associate Reporter and an experienced Chair for each subcommittee.

The subcommittees soon got to work, holding in-person organizational meetings followed by two-hour conference calls that were scheduled each week for many months. The subcommittees, aided by the Associate Reporters, developed drafts that were circulated to the full membership of COSAC, which held nine plenary meetings. Most of these meetings were held in New York City (at Steve's firm, Proskauer), but COSAC also held two-day plenary meetings in Rochester and in Albany.

When we debated Rule 3.8, entitled “Special Responsibilities of Prosecutors,” Steve especially solicited comments from prosecutors, and COSAC received comments from the New York District Attorney’s Association, prosecutors from all four federal districts in New York, and various individual District Attorneys in New York. Then Steve invited state and federal prosecutors (and various criminal defense lawyers) to an all-day meeting of COSAC at Proskauer, and he had COSAC consult with the prosecutors after that meeting before proposing a final version of Rule 3.8 (the version eventually recommended to the Courts).

Once COSAC had developed final language on a group of proposed rules, Steve posted those rules on the NYSBA web site for public comment. Nine different bar groups submitted comments. Steve circulated these comments to COSAC members, who considered every comment carefully and made some changes in response.

On September 30, 2005, after two-and-a-half years of meetings and conference calls, COSAC issued its massive 479-page Report and Recommendations (plus a supplemental volume showing the differences between COSAC’s proposals and the ABA Model Rules in redline fashion). Then Steve obtained a scheduling order to present and debate the proposed rules in the House of Delegates, starting with a purely informational session on the proposed rules at the January 2006 Annual Meeting of the New York State Bar Association. In April of 2006, the House decided to adopt the format of the ABA Model Rules. At the next six quarterly meetings, the House of Delegates debated a specific group of rules. In between meetings, COSAC solicited public comment on the draft rules, and received input from seventeen different bar groups (and five individuals).

In the middle of all this, the Courts announced that radically amended Disciplinary Rules governing advertising and solicitation would take effect on February 1, 2007. Steve immediately organized a subcommittee of COSAC to draft Ethical Considerations to interpret and explain the new advertising rules. The proposed ECs were circulated for public comment, and by November of 2007 they were approved by the House of Delegates.

In the end, because of the careful work orchestrated by Steve – and because Steve made sure that every lawyer had an opportunity to comment on COSAC’s proposals and made sure that COSAC considered every comment – the House of Delegates approved nearly every one of COSAC’s proposed rules. And where a particular proposal encountered opposition or criticism (e.g., the screening proposal in Rule 1.10), Steve worked closely with the critics to understand their concerns and incorporate their ideas. He was never a dictator.

In November of 2007, the House of Delegates gave final approval to the proposed New York Rules of Professional Conduct. Steve then coordinated the proofreading and presentation to ensure that the Presiding Justices would have all of the information they needed to understand and evaluate COSAC’s proposals. He also to the Presiding Justices, Steve asked COSAC members in each department to deliver the proposed rules to each Presiding Justice by hand. By early February of 2008, the proposed rules were in the hands of the Courts. The Courts rejected much of COSAC’s language, but they did finally usher New York into the era of the New York Rules of Professional Conduct.

Conclusion: Steve Krane was a wonderful leader

I have tried in this article to paint an accurate picture of one aspect of Steve Krane's work for the State Bar that he loved so much. He was a wonderful leader and a tireless worker. He mastered the big picture as well as the small details. He demanded inclusion, transparency, and due process. He was a consensus builder, an organizer, and a brilliant student of legal ethics. And he had the indispensable quality of a great leader: he inspired people to follow him. As the Vice-Chair and Chief Reporter for COSAC, I was able to watch him closely and work with him frequently. I will always be grateful for that opportunity.

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